Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

SAMY A. MANKARIOUS AND THOMAS K. MURPHY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. IN A MONEY LAUNDERING CASE WHERE THE UNDERLYING PREDICATE OFFENSES ARE MAIL AND WIRE FRAUD, DOES THE GOVERNMENT'S FAILURE TO PLEAD MATERIALITY IN THE INDICTMENT, AND THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURY TO CONSIDER THE ELEMENT OF MATERIALITY AS NOW REQUIRED BY *NEDER*, MANDATE A REVERSAL OF PETITIONERS' CONVICTIONS AS A MATTER OF LAW UNDER *APPRENDI*?

II. EVEN IF *APPRENDI* DOES NOT REQUIRE REVERSAL OF PETITIONERS' CONVICTIONS UNDER *APPRENDI*, DOES *NEDER* REQUIRE DISTRICT COURT REVIEW?

LIST OF PARTIES BELOW

The United States of America and the Petitioners, Samy A. Mankarious and Thomas K. Murphy, were the parties to the proceedings in the court whose judgment is sought to be reviewed.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Samy A. Mankarious and Thomas K. Murphy (Petitioners) respectfully pray that this Court issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered on March 11, 2002.

OPINIONS BELOW

The opinion in the United States Court of Appeals for the Seventh Circuit is *Mankarious v. United States*, 282 F.3d 940 (7th Cir. 2002), which is reproduced in the appendix to

this petition. The district court's March 2, 2001 decision leading to that appeal also is reproduced in the appendix.

JURISDICTIONAL GROUNDS

The decision sought to be reviewed was entered in the United States Court of Appeals for the Seventh Circuit on March 11, 2002. This Court has jurisdiction to review that decision by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The issues in this case involve the government's failure to plead materiality and the district court's failure to instruct the jury that materiality was an element of the mail and wire fraud against Petitioners. Materiality also impacts the jury's determination that Petitioners were guilty of the money laundering charges arising from those mail and wire fraud charges, as well as the tax counts. Although the statutes prohibiting mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and money laundering, 18 U.S.C. § 1956(a)(1)(B), are relevant to these issues, the terms of the statutes are not critical to this Court's analysis and therefore they are not reproduced in the appendix.

STATEMENT OF THE CASE

"I believe that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged -- which necessarily means his commission of *every element* of the crime charged -- can never be harmless." *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting) (emphasis in original). This statement of the fundamental principle of the American system of justice, pronounced by Justice Scalia in his *Neder* dissent, begs the question that is at the core of Petitioners' case: what post-conviction remedy is

available to convicted defendants when an essential element of the charges against them was never pled, instructed or proven? Petitioners submit that this Court answered that question in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which reversed a conviction for lack of a jury finding as to an essential element. Even if *Apprendi* does not require reversal, *Neder* established a procedure which requires a court to review the record to determine whether the failure to require a jury finding on this essential element is error. "If, at the end of that examination, the court cannot conclude *beyond a reasonable doubt that the jury verdict would have been the same* absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." *Neder*, 527 U.S. at 19 (emphasis added). Neither the Seventh Circuit nor the district court adopted either procedure in reviewing Petitioner's post-conviction motion, contrary to Petitioners' rights under the Fifth and Sixth Amendments, *Apprendi*, *Neder* and other decisions of this Court and other Circuit Courts of Appeals.

Petitioners' post-conviction challenge to their sentences follows their criminal convictions arising from their co-ownership and operation of Delta Group, Inc. (Delta), a smelting facility located in Muskego, Wisconsin. This challenge was based in part on the government's failure to allege materiality as an element of its mail and wire fraud charges against Petitioners and the district court's failure to instruct the jurors that they must find materiality in order to convict Petitioners of mail fraud, wire fraud or money laundering based on those underlying offenses.

On June 10, 1999, following Petitioners' trial and direct appeal, the United States Supreme Court released *Neder*, which articulated a new standard, conclusively and unequivocally holding that the materiality of a misrepresentation is an essential element of federal mail

fraud, wire fraud and bank fraud statutes. *Neder*, 527 U.S. at 4. The *Neder* Court then remanded the case to the Eleventh Circuit Court of Appeals to determine whether the jury instruction error in that case was harmless. 527 U.S. at 25. Subsequently, this Court released *Apprendi*. The core principle arising from *Apprendi* was that the Fifth Amendment's guarantee of due process and the Sixth Amendment's guarantee of fair notice and the right to a jury trial mandated that the essential elements of a charge against a defendant must be both alleged in the indictment and proven beyond a reasonable doubt. *Apprendi*, at 530 U.S. at 476-478. The interrelationship between *Neder* and *Apprendi* was one of the grounds upon which Petitioners sought relief pursuant to 28 U.S.C. § 2255. They argued that they were entitled to a reversal of their convictions, or at least a new trial based on the government's failure to include the element of materiality in the indictment and the district court's failure to instruct the jury on the issue of materiality.

On March 2, 2001, the district court issued its decision denying Petitioners' motion. The district court recognized that *Neder* announced a new legal standard regarding materiality which did not exist in the Seventh Circuit at the time of Petitioners' trial and direct appeal. Nonetheless, the district court concluded that any error was harmless under *Jenkins v. Nelson*, 157 F.3d 485, 496 (7th Cir. 1998).

Petitioners appealed the district court's decision pursuant to 28 U.S.C. § 2253. The Seventh Circuit rejected the district court's finding that it could even reach the question of harmless error, concluding instead that *Neder* established a new rule of procedure – not substantive law – and therefore was not to be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). The appellate court based its ruling on *United States v. Coffman*, 94 F.3d 330, 335 (7th Cir. 1996), which the court characterized as holding

that materiality is an element of mail fraud. In reality, the Coffman court never stated that materiality was an element which was required to be plead and proven. The Seventh Circuit also summarily rejected Petitioners' *Apprendi* argument, holding that because *Apprendi* applies only if a defendant is sentenced to a term of imprisonment exceeding the statutory maximum, and because Petitioners were sentenced to the maximum, *Apprendi* had no application to Petitioners' case.

By these rulings, the Seventh Circuit failed to address Petitioners' Fifth and Sixth Amendment implications of *Apprendi* and *Neder*. It is undisputed that the government did not plead materiality, the court did not instruct on materiality and the jury did not find materiality. Thus, Petitioners have been denied their constitutional right to due process, notice and trial by jury.

ARGUMENT IN SUPPORT OF WRIT

I. THE GOVERNMENT'S FAILURE TO ALLEGE MATERIALITY AS AN ELEMENT OF MAIL AND WIRE FRAUD IN THE INDICTMENT, ALONG WITH THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURY THAT THEY MUST FIND MATERIALITY TO CONVICT PETITIONERS, ARE REVERSIBLE ERRORS OF CONSTITUTIONAL DIMENSION MANDATING AN ORDER VACATING THEIR WIRE FRAUD AND MONEY LAUNDERING CONVICTIONS.

Although its factual underpinnings involve whether sentence enhancers must be found by a jury based on proof beyond a reasonable doubt, *Apprendi* is not limited to its facts. Rather, *Apprendi* reaffirms the centuries-old principle that a person charged with a criminal offense be advised as to each element of the offense and be convicted by proof

beyond a reasonable doubt as to each of those elements. *Apprendi*, 530 U.S. at 477. Taken together, a defendant's Fifth and Fourteenth Amendment right to due process of law and Sixth Amendment right to a jury trial "entitle a criminal defendant to 'a jury determination that [he] is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt.'" *Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995); citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In Re Winship*, 397 U.S. 358, 364 (1970)). In *Gaudin*, the Court explained that its recognition of these principles was grounded in centuries of common law. *Gaudin*, 515 U.S. at 510-11. "[T]rial by jury has been understood to require that '*the truth of every accusation*', whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . . .'" *Apprendi*, 530 U.S. at 477 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). Moreover, the right to have a criminal case jury verdict based on a higher level of proof has been "expressed from ancient times" with its crystallization into "beyond a reasonable doubt" occurring as late as 1798. *Apprendi*, 530 U.S. at 478 (quoting *Winship*, 397 U.S. at 361).

Applying these fundamental principles in conjunction with *Neder*, Petitioners cannot be convicted of mail, wire or bank fraud, or any other offenses based on those offenses, unless the element of materiality is set forth in the indictment and proven beyond a reasonable doubt. It is undisputed that neither the original nor the superseding indictment against Petitioners identified materiality as an element of the mail and wire fraud offenses charged. The government argues below that because Petitioners did not challenge the sufficiency of the indictment in the district court, and because the indictment alleges facts which support an "inference" of materiality, the indictment is immune from attack. The government is wrong. Prior to *Neder*, materiality was not an

element of the offense required to be identified in the indictment. Petitioners had no basis to challenge the indictment for its failure to allege materiality at the time of trial.

It also is undisputed that Petitioners' jury never was instructed as to materiality and never found that materiality existed. In fact, the jury was instructed that *any* fraud scheme would suffice for conviction. The jury could have applied this instruction to the independent frauds admitted by the government's witnesses which had no connection at all to Petitioners.

In the same vein, the record does not establish that the government proved and the jury found *any* material misrepresentations. Indeed, there were none. Just as the trial court in *Apprendi* could not substitute its review for a jury finding as to an essential element of the charged offense, the district court could not substitute its conclusion for a jury finding of materiality. Similarly, the court could not substitute its own judgment for that of the jury with respect to the tax counts. The jury made no finding as to the *amount* of the tax loss allegedly incurred as a result of Petitioners' actions. The amount of loss was a critical factor, which the jury was never instructed to find and therefore never found.

The Seventh Circuit summarily rejected Petitioners' *Apprendi* argument, citing its prior holdings that *Apprendi* is "beside the point" when a defendant is sentenced to a term of imprisonment within the statutory maximum. *Mankarious*, 282 F.3d at 944 (citing *United States v. Williams*, 238 F.3d 871, 877 (7th Cir. 2001); *Talbott v. Indiana*, 226 F.3d 866, 869 (7th Cir. 2000)). These holdings narrowly construe and limit *Apprendi* to its facts, failing to recognize the *Apprendi* Court's unequivocal recognition of the constitutional mandate that a person charged with a crime be notified of and found guilty of *every* element of the offense charged.

Apprendi reaffirms that a defendant's conviction be vacated and all charges dismissed when an essential element of the offense is not presented in the indictment or to the jury for consideration. Maintaining Petitioners' convictions despite the absence of materiality contravenes not only *Neder*, but also centuries of common law and decisions of the Supreme Court. The principles explained in *Apprendi* mandate reversal of Petitioners' convictions.

II. PETITIONERS ARE ENTITLED TO A DISTRICT COURT REVIEW OF THEIR CONVICTIONS CONSISTENT WITH *NEDER*.

In *Neder*, this Court unequivocally established that materiality is an element of mail, wire and bank fraud. The majority of this Court concluded that the remedy for failing to instruct the jury that the government must prove this essential element to find a defendant guilty is for the court to engage in a harmless error analysis:

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude *beyond a reasonable doubt that the jury verdict would have been the same absent the error* -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless.

Neder, 527 U.S. at 19 (emphasis added).

Despite the undisputed fact that materiality was neither pled nor instructed nor proven in Petitioners' case, the Seventh Circuit concluded that *Neder* did not require any

change in their convictions, holding that *Neder* was not retroactive under *Teague*, that *Neder* did not constitute a change in substantive law, that Petitioners did not establish cause for failing to raise the materiality issue in their direct appeal and that, even if they had cause, Petitioners suffered no prejudice. The Seventh Circuit's holdings regarding the applicability of *Neder* are contrary to the precedent of this Court and the decisions of other Circuit Courts of Appeals.

Petitioners acknowledge that under *Teague*, new *rules* may not be applied retroactively to cases on collateral review. Changes in rules, however, are not the equivalent of changes in the interpretation of substantive law. This Court has confirmed that *Teague*'s retroactivity bar applies only to new rules of criminal *procedure*; it does not apply to changes in *substantive* law. *Bousley v. United States*, 523 U.S. 614, 620 (1998), *quoted in Robinson v. United States*, 196 F.3d 748 (7th Cir. 1999), *vacated and remanded on other grounds*, 121 S.Ct. 851, 148 L.Ed.2d 766, 69 USLW 3479 (U.S. Jan 16, 2001) (emphasis added). The distinction between new procedural rules, which are subject to *Teague*, and changes in substantive law, which are not, was addressed by the Second Circuit in *United States v. Mandanici*, 205 F.3d 519 (2nd Cir. 2000). *Mandanici* also confirms that a determination that materiality is an element of an offense is a substantive rather than procedural change of law.

Mandanici was charged with making false statements in violation of 18 U.S.C. § 1001, a statute comprised of three separate offenses. *Mandanici,* 205 F.3d at 520. At the time of Mandanici's trial, the law of the Second Circuit was that materiality was an element of only one of those offenses and, as to that offense, materiality was to be determined by the judge and by a preponderance of the evidence, not by the jury by proof beyond a reasonable doubt. *Id.* Materiality was not an element of the two remaining offenses of making false statements and making or using false writings. *Id.*

Eleven years after Mandanici's convictions were affirmed on appeal, the United States Supreme Court decided *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), holding that *if* materiality is an element of section 1001, a finding of materiality is an issue for the jury and not the judge. *Gaudin* did not decide the ultimate issue of whether materiality was an element of section 1001, but four months later, in *United States v. Ali*, 68 F.3d 1468, 1474-75 (2nd Cir. 1995), *amended on denial of reh'g*, 86 F.3d 275 (2nd Cir. 1996), the Second Circuit overruled its prior precedents to the contrary and determined that materiality was an element of any and all charges under section 1001. Two years later, the Second Circuit considered whether *Gaudin* or *Ali* applied retroactively on collateral review in *Bilzerian v. United States*, 127 F.3d 327 (2nd Cir. 1997).

Bilzerian was convicted in 1983 of both concealing material facts and making false statements. Consistent with the then-applicable law of the Second Circuit, the district judge made findings of materiality with respect to the concealment charges, but made no findings concerning materiality with respect to the false statement charges. *Id.* Faced with these facts on appeal, the Second Circuit conducted a bifurcated analysis. The court first determined that *Gaudin*'s requirement that the jury and not the judge make the materiality finding was a new rule of constitutional criminal procedure. Because neither of the *Teague* exceptions applied, the *Bilzerian* court concluded that *Gaudin* could not be applied retroactively. *Id.*, at 240-41. In contrast, the *Bilzerian* court concluded that the *Ali* holding -- that materiality is an element of the offense of making false statements in violation of section 1001 -- was substantive, rather than procedural. Thus, the court concluded that *Ali* applied retroactively. *See Bilzerian*, 127 F.3d at 242.

The *Mandanici* court summarized the *Bilzerian* analysis as follows:

> While a new rule of constitutional criminal procedure generally does not apply retroactively on collateral review, a new rule of substantive criminal law is *presumptively* retroactive because a defendant may have been "punished for conduct that simply is not illegal."

Mandanici, 205 F.3d at 525 (quoting *Bilzerian*, 127 F.3d at 242) (emphasis added) (additional citations omitted). Under *Mandanici*, a caselaw determination that materiality is an element of an offense, contrary to the prior law of the circuit, redefines the offense "to legalize certain conduct previously thought to be criminal" and, therefore, that determination is a substantive change in the law which applies retroactively on collateral review. *Id.*

The Seventh Circuit did not even address this analysis below, presumably because of its dogged insistence that materiality already was an element of mail and wire fraud in the Seventh Circuit at the time of Petitioners' trial based on *Coffman*. A closer look at *Coffman*, however, reveals that it did not go as far as the Seventh Circuit suggests. Although it is true that *Coffman* referred to materiality in the context of mail and wire fraud, the *Coffman* court did not expressly hold that materiality is a separate and distinct element of those offenses which must be pled, instructed and proven in order to convict. Instead, *Coffman* simply noted that the concept of materiality was "embodied" in the word fraud. In other words, *Coffman* stood for the proposition that everyone -- the court, counsel and the jury -- should just assume materiality existed whenever a fraud was charged.

The *Coffman* court's "embodiment" philosophy is a far cry from *Neder*'s express holding that materiality is an element of mail, wire and bank fraud. Like the *Ali* ruling that materiality is an element of false statements under section 1001, the *Neder* Court's determination that materiality is an element of mail and wire fraud is a substantive change in the law. Because this change is one of substance rather than procedure, *Teague* does not and cannot apply and therefore *Neder* applies retroactively and may be the basis for Petitioners' collateral attack on their convictions.

The Seventh Circuit also misapplied prior precedent when it concluded that Petitioners waived their right to challenge the lack of a materiality instruction because they did not raise the issue in their direct appeal. The question is whether a defendant is required to raise on direct appeal every conceivable constitutional challenge that might some day be accepted, even if those issues clearly conflict with established law.

Prior to *Neder*, the law of the Seventh Circuit was that district courts should not instruct juries that materiality was an element of mail, wire or bank fraud. Even in *Coffman*, issued just days before Petitioners' jury was instructed, Chief Judge Posner rejected the idea that a separate materiality instruction was required in fraud cases. *Coffman*, 94 F.3d at 335. Nonetheless, the Seventh Circuit held that Petitioners should have raised the materiality issue in their direct appeal, stating: "the fact that an argument was unacceptable at a particular time does not constitute cause for failing to raise it." *Mankarious,* 282 F.3d at 943 (citing *Bousley*, 523 U.S. at 622).

A closer look at *Bousley*, however, reveals that the "futility" language relied upon by the Seventh Circuit is quoted from a footnote to *Engle v. Isaac,* 456 U.S. 107, 130

n.35 (1982), which itself cites the *dissenting* opinion in *Myers v. Washington*, 646 F.2d 355, 364 (9th Cir. 1981). The *Myers* dissenter, Judge Poole, opined, "I suspect that what the majority means by 'unknown' is something like unacceptable to that particular court at that particular time." *Id.* at 364. The *Myers* majority, however, had a much different view, concluding that the cause and actual prejudice rule established in *Wainwright v. Sykes*, 433 U.S. 72 (1977), did not apply where the defendant failed to raise an issue because he did not believe an action of the trial court violated his rights:

> . . . [I]t is quite unreasonable to insist that where a criminal defendant does not believe the trial court has violated his constitutional rights and indeed would have no reason to believe so unless he were able to anticipate how constitutional law would evolve over the next twenty years he must nevertheless object either at trial or on appeal. Nor is it plausible to fear "sandbagging" in a case where the defense attorney in preparing an appeal omits what appears at the time to be a futile constitutional argument. In such a situation, to enforce *Washington's* rule against raising on collateral attack issues not raised on direct appeal would, if it achieved anything at all, simply encourage defense attorneys to raise on appeal every conceivable constitutional challenge that might some day be accepted and thus overload their briefs with unmeritorious issues. Thus, the reasons given in *Sykes* for enforcing a state contemporaneous-objection rule presuppose that the defendant had reason to believe during the trial that the trial court had violated his rights. In this case the defendant had no reason at the time of trial to believe his rights had been violated by the jury instructions. Therefore, we have little trouble

> concluding that federal habeas review should be available.

Myers, 646 F.2d at 360.

Until *Neder*, and certainly at the time of Petitioners' trial, materiality was not an element of mail or wire fraud that had to be pled, instructed or proven under the law of the Seventh Circuit. Therefore, it would have been contrary to existing law for the district court to give a separate instruction requiring the jury to find materiality. Any defense lawyer in the Seventh Circuit who argued that a jury must receive a separate instruction that materiality was an element of mail fraud was opening himself or herself up for sanctions for advocating a position clearly contrary to the law of the circuit.

Granting a writ in this case would provide this Court an opportunity to confirm *Neder*'s application on collateral review. Absent a conclusive ruling by this Court that *Neder* created a new substantive rule of law, rather than a procedural rule, the Seventh Circuit will continue to deny defendants any opportunity to collaterally challenge their convictions under *Neder*, even where it is clear that defendants were denied their constitutional right to have a jury determine their guilt of *every element* of the crimes charged against them. Petitioners urge this Court to grant a writ and, ultimately, to remand this case to the district court with instructions to conduct an examination of the record in accord with the harmless error standard established in *Neder*: that a district court must conduct a thorough examination of the record and. following that examination, the court cannot find harmless error unless the court concludes beyond a reasonable doubt that the jury verdict would have been the same even without the error.

CONCLUSION

For all the foregoing reasons, Petitioners Samy A. Mankarious and Thomas K. Murphy respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Dated this 5 day of June, 2002.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

In the

United States Court of Appeals,

Seventh Circuit.

No. 01-2227

Samy A. Mankarious and Thomas K. Murphy,

Petitioners-Appellants,

v.

UNITED STATES of America,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Rudolph T. Randa, Judge.

Argued Jan. 7, 2002–Decided March 11, 2002

Before MANION, ROVNER, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. Over 3 years ago, on direct appeal, we affirmed the convictions of Samy Mankarious and Thomas Murphy on charges of money laundering, wire fraud, and filing false tax returns. *See United States v. Mankarious*, 151 F.3d 694 (7th Cir.1998). They now make a return visit to us, this time challenging the denial of their motion for collateral relief under 28 U.S.C. § 2255. We assume familiarity with the facts and only repeat what we think is necessary to resolve the present appeal.

Mankarious and Murphy's first argument is that they are entitled to reversal or a new trial because the district court did not instruct the jury on "materiality" with regard to the

wire fraud charges on which they were convicted. They base this argument on *Neder v. United States*, 527 U.S. 1, 4, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), where the Supreme Court held that materiality is an element of the federal mail, wire, and bank fraud statutes and that the issue must be submitted to the jury.[1] In denying the present § 2255 motion, the district court recognized that *Neder* requires that the issue of materiality be considered by the jury but concluded that the failure to do so in this case was harmless under *Jenkins v. Nelson*, 157 F.3d 485, 496 (7th Cir.1998).

Neder was decided in 1999, after Mankarious and Murphy's direct appeal was resolved, and this presents a huge problem for them under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Teague* holds that, unless it falls within an exception, a new constitutional rule of criminal procedure is not applicable to cases that are final when the new rule is announced. *See Teague*, 489 U.S. at 310, 109 S.Ct. 1060. The *Teague* rule is important, for it serves the interest of finality, a goal that would be frustrated if older cases like this one could be resuscitated every time a new decision is announced t hat calls into question modes of operation accepted in the past as appropriate procedure. For this reason, since *Teague*, "few constitutional arguments apply retroactively on collateral attack." *United States v. Smith*, 241 F.3d 546, 549 (7th Cir.2001).

There are two exceptions under *Teague*, and they apply to (1) new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and (2) rules that define procedures implicit in the concept of ordered liberty. *See id.* at 311, 109 S.Ct. 1060.

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[1] The trial judge in *Neder* had told the jury that the issue of materiality "is not a question for the jury to decide."

To get around *Teague*, Mankarious and Murphy argue[2] that *Neder*'s holding that materiality is an element of fraud offenses announced a change in substantive law, not a new rule of criminal procedure. But we held before *Neder* that materiality was an element of wire fraud in *United States v. Coffman*, 94 F.3d 330, 335 (7th Cir.1996). Therefore, the only change *Neder* precipitated in our circuit was requiring that a separate instruction on materiality be given to juries. This is a change in procedure, not in substantive law. For this reason, and because *Neder* does not fall within an exception to the *Teague* rule, *Neder* is not available to Mankarious and Murphy on this collateral review.

But is snuffing out Mankarious and Murphy's claim on *Teague* grounds cricket? That's a fair question. We answer it with a resounding yes, for even if *Teague* did not bar application of *Neder* to their § 2255 motion, Mankarious and Murphy are still barred from raising their lack of a materiality instruction argument for the first time on collateral review. An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for and actual prejudice resulting from the failure to raise it. *See Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir.1996).

Mankarious and Murphy argue that they can demonstrate cause because the law in this circuit prior to *Neder* rejected the requirement of a materiality instruction. But the fact that an argument was unacceptable at a particular time does not constitute cause for failing to raise it. *See Bousley v. United*

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[2] Mankarious and Murphy also argue that the government waived reliance on *Teague* by not raising it in the district court. We reject that contention. *See Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

States, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). The possibility of a separate materiality instruction in fraud cases was not a new issue when this case went to trial. The defendants in *Coffman*, decided 2 years before Mankarious and Murphy's direct appeal, argued (although unsuccessfully) that the lack of a materiality instruction required reversal of their wire fraud convictions. *See Coffman,* 94 F.3d at 335. Additionally, we noted in *Coffman* that the Ninth Circuit addressed the subject of a separate materiality instruction in mail fraud cases in 1981, 15 years before Mankarious and Murphy's trial. *See Coffman,* 94 F.3d at 335 (citing *United States v. Halbert,* 640 F.2d 1000, 1007-08 (9th Cir.1981)).

Even assuming, as the district court did, that Mankarious and Murphy demonstrated cause for their failure to raise the materiality instruction issue on direct appeal, they cannot demonstrate prejudice. Prejudice exists where an error has a substantial and injurious effect or influence in determining a jury's verdict. *See Jenkins,* 157 F.3d at 496. On collateral review, we reverse only if we are in grave doubt as to the harmlessness of the error. *See id.* at 494.

Here, the government presented substantial evidence that Mankarious and Murphy orchestrated and participated in the wire fraud schemes. For example, one of the government's witnesses was Ed Brown, partial owner of UPEC & Associates. Brown testified that Mankarious outlined a plan for Brown to bilk money out of Delta, the aluminum smelting company that Mankarious and Murphy partially owned. (The remaining 41 percent of Delta was owned by WITECH, a venture capital operation run by Wisconsin Energy Corp., Wisconsin's largest utility.) Brown shared a cut of the proceeds of this scheme with Mankarious and Murphy. Under the scheme, UPEC performed work at Delta, with Brown submitting false invoices for each job. Mankarious and Murphy then cut checks to cover these invoices,

sometimes making the checks out to fictitious payees. Brown endorsed the checks and returned them to Mankarious, who cashed them at a tavern. This scheme was only the first in a series of schemes that Mankarious, Murphy, and Brown cooked up together. Therefore, substantial evidence of Mankarious and Murphy's participation in the fraud scheme existed so that the absence of a separate materiality instruction could not have had a substantial and injurious effect in determining the jury's verdict.

Mankarious and Murphy also argue that the lack of a materiality instruction requires reversal under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* held that, other than a prior conviction, any fact that increases the penalty for a crime beyond its statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *See id.* at 490, 120 S.Ct. 2348. We have noted on more than one occasion that when the defendant is sentenced to a term of imprisonment within the statutory maximum, *Apprendi* is beside the point. *See United States v. Williams,* 238 F.3d 871, 877 (7th Cir.2001); *Talbott v. Indiana,* 226 F.3d 866, 869 (7th Cir.2000). Here, Mankarious and Murphy were sentenced to 60 months on the wire fraud convictions, which coincides exactly with the maximum authorized term of imprisonment for the offenses. *See* 18 U.S.C. § 1343.

Mankarious and Murphy next argue that they are entitled to a hearing to explore whether any government witnesses received improper inducements for their trial testimony. In support of this argument, they rely on *United States v. Condon,* 170 F.3d 687, 689 (7th Cir.1999), where we held that 18 U.S.C. § 201(c)(2) does not bar testimony from a witness who was promised immunity because such a promise is not a "thing of value" within the meaning of the statute. Mankarious and Murphy argue that *Condon* expanded the definition of "thing of value" because it noted that

"cancellation of a private debt could be a 'thing of value' in the statutory sense...." *Id.* at 689. This language did not expand the definition of "thing of value." In addition to being dicta, the quoted language states a principle that was as obvious at the time of Mankarious and Murphy's trial as it is now. Mankarious and Murphy had ample opportunity to cross-examine the government's witnesses at trial (and did so with experienced counsel) about what sort of inducements they may have received to testify and whether these inducements were lawful. Therefore, they are not entitled to a hearing.

Finally, Mankarious and Murphy argue that they have new evidence which entitles them to a new trial. The evidence is described in an affidavit from Norm Lo Presto, an indicted coconspirator. After they filed their § 2255 motion, Mankarious and Murphy learned that Lo Presto had resolved his case and was willing to execute an affidavit outlining his knowledge of the activities of Roger Green. Green ran a Ponzi scheme through Metal Brokers International (MBI), which Mankarious and Murphy discovered when Delta began selling metal through MBI. When they discovered the scheme, Green offered to pay them off, but Mankarious instead suggested that they pursue "business opportunities" together. Green testified against Mankarious and Murphy, alleging the existence of an accounts receivable scheme. Mankarious and Murphy argue that Lo Presto's affidavit demonstrates that this scheme did not exist.

The parties disagree on the proper mechanism for presenting this claim of newly discovered evidence. The government argues that Mankarious and Murphy were required to bring the claim under Rule 33 of the Federal Rules of Criminal Procedure. Mankarious and Murphy argue that they can press the claim as part of their motion under § 2255.

Under Federal Rule of Criminal Procedure 33, a district court may grant a new trial on the basis of newly discovered evidence within 3 years of the verdict or finding of guilt. Here, the 3-year limit expired 3 months before Mankarious and Murphy filed their § 2255 motion, and defendants, as we know, may not use § 2255 to circumvent Rule 33's time limit. *See Guinan v. United States,* 6 F.3d 468, 470 (7th Cir.1993).

But because a section of § 2255--enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA)--in some very limited cases allows a defendant to file a second or successive motion based on newly discovered evidence demonstrating actual innocence, Mankarious and Murphy say they may bring their claim as part of their present motion.[3] But to be raised here, the claim must still meet certain requirements outlined in the opening paragraph of § 2255. The petitioner must allege either that the challenged sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose the sentence, that the sentence was in excess of the maximum authorized by law, or that the sentence is otherwise subject to collateral attack.

Mankarious and Murphy do not allege that the district court was without jurisdiction to impose their sentence, nor that the sentence was in excess of the authorized maximum. They do make a passing reference to due process and suggest that § 2255 makes newly discovered evidence a basis for which a sentence is "otherwise subject to collateral attack." But a conviction does not violate the Constitution nor become otherwise subject to collateral attack merely because newly discovered evidence may be helpful to a defendant. *See United States v. Evans,* 224 F.3d 670, 674 (7th Cir.2000). Thus, Mankarious and Murphy's claim of newly discovered

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[3] Even generously construed, Lo Presto's new tune does not sing a song of actual innocence.

evidence, untimely under Rule 33, does not meet the requirements of § 2255 and may not, therefore, be considered.
AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SAMY A. MANKARIOUS and
THOMAS K. MURPHY,

Petitioners,
vs. **Case No. 95-CR-96**
99-C-1450

UNITED STATES OF AMERICA,

Respondent.

DECISION AND ORDER

This matter comes before the Court on petition by petitioners Samy A. Mankarious ("Mankarious") and Thomas K. Murphy ("Murphy") to vacate, set aside or correct their sentences pursuant to 28 U.S.C. § 2255. Petitioners were convicted of mail fraud, money laundering based upon wire fraud, and wire fraud.

Petitioners challenge these convictions with three arguments. First, petitioners argue that United States v.

Neder, 527 U.S. 1 (1999), causes the money laundering convictions to be constitutionally defective in that the underlying fraud schemes required the Court to submit the materiality element of the fraud charges to the jury. Second, they argue that their convictions and sentences must be set aside because government witnesses may have received improper financial inducements. United States v. Condon, 170 F.3d 687 (7th Cir. 1999). Lastly, petitioners assert that new evidence submitted in the form of an affidavit by a co-defendant constitutes "newly discovered evidence" which would have defeated the government's case.

For the reasons set forth below, petitioners' motion is denied.

I. BACKGROUND

The Court presupposes the parties' familiarity with the extensive factual background outlines by the Court of Appeals in United States v. Mankarious, 151 F.3d 691 (7th Cir. 1998) and will give only a brief summation for purposes here. Petitioners owned 59 percent of Delta Company with the remaining 41 percent belonging to WITECH, a venture capital corporation operated by Wisconsin Energy Corporation. A former co-defendant, Ed Brown (Brown), owned a company known as UPEC. As part of the scheme, UPEC would perform work for Delta after which Brown would submit false inflated receipts for each job. Petitioners and Brown would split the fraudulent proceeds. The scheme varied over time. For example, UPEC, through Brown, falsely billed Delta (and at times inflated the bill for an additional kick-back) for petitioner's personal home projects such as kitchen cabinets, house painting and remodeling. Additionally, petitioners submitted their own false expense invoices to Delta. For example, petitioners billed Delta for personal home improvement purchases under the guise of a proper business expense.

Petitioners later expanded their scheme to defraud with one Roger Green (Green). Green ran Metal Brokers International (MBI). At one point, petitioners realized that Green, a metal broker, was running a fraudulent scam at MBI and, because they were a potential target of Green's scam, confronted Green. This confrontation led to a decision to work together to create a more elaborate scheme. Briefly, Green would purchase mental from companies under the false pretense that a large reputable user such as Emerson Electric or GE would purchase the metal. Green established bank accounts which made it appear that large companies were paying the bills. Green routinely made late payments for the aluminum which amounted to a Ponzi scheme. See Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995).

As just part of the Delta-MBI relationship, Delta would ship aluminum to MBI, but bill Emerson. A cohort at Emerson would intercept the bills and send them to MBI. Petitioner Mankarious used these accounts receivable receipts to obtain a greater credit limit from the bank. With this additional line of credit, Delta made payments to MBI for cheap aluminum and paid Green inflated commissions. Green would return the favor by paying monies to separate companies petitioners had set up. Some of these payments of course utilized wire transfers.

At trial, this Court did not include "materiality" as an element of either the mail or wire fraud offenses in the instructions to the jury. Petitioners did not object. The jury subsequently convicted the petitioners on the mail and wire fraud and money laundering counts.

Petitioners appealed their convictions and sentences in a direct appeal. The Seventh Circuit Court of Appeals affirmed their convictions on September 28, 1998. The crux of this collateral attack is based on Supreme Court and

Seventh Circuit case law rendered after the petitioners' convictions and direct appeal.

II. STANDARD OF REVIEW

Title 28 U.S.C. § 2255 limits relief to instances in which a prisoner can show that there are "flaws in the conviction or sentence which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice." Boyer v. United States, 55 F.3d 296, 298 (7th Cir. 1995). A motion to vacate or modify a conviction or sentence under § 2255 is not a substitute for a direct appeal. Barnickel v. United States, 113 F.3d 704, 706 (7th Cir. 1997); Doe v. United States, 51 F.3d 693, 698 (7th Cir. 1995).

"An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for the failure to raise claims on direct appeal and actual prejudice from the failure to raise those claims, or refusal to consider the issue would lead to fundamental miscarriage of justice." Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996). Furthermore, without a showing of cause, even constitutional arguments are procedurally barred from collateral attack. Lemons v. O'Sullivan, 54 F.3d 357, 360 (7th Cir. 1995).

"Summary dismissal of a § 2255 petition is appropriate when the 'motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Aleman v. United States, 878 F.2d 1009, 1012 (7th Cir. 1989) (quoting 28 U.S.C. § 2255). "[A] judge should dismiss the petition without a hearing if it 'plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief.'" Id. (quoting Rule 4(b) of the Rules Governing Section 2255 Proceedings). Even where the petitioners make factual allegations, the court need not necessarily conduct an

evidentiary hearing. Id. at 1012. Other standards as they relate to the various issues are discussed infra.

III. DISCUSSION

A. MATERIALITY INSTRUCTION

As the Neder Court established, materiality is an element of a "scheme or artifice to defraud" under 18 U.S.C. §§ 1341, 1342, 1344, the federal wire fraud, mail fraud and bank fraud statutes. United States v. Neder, 527 U.S. 1 (1999). Under this ruling, the element of materiality is an issue for the jury to determine. Id. However, the actual use of the mail or wires themselves need not be material at all. "It is sufficient for the mailing to be incident to an essential part of the scheme." Schmuck v. United States, 489 U.S. 705, 710-11 (1989) (citations and quotations omitted). Failure to instruct a jury on the element of materiality is subject to the harmless error rule on direct appellate review. Under this test, the reviewing court must determine "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder, 527 U.S. at 15.

The standard of review on direct appeal differs from that on collateral review but, the difference appears minimal. The Seventh Circuit in Jenkins v. Nelson, 157 F.3d 485, 496, established the following standard of review in habeas cases. Looking at the record as a whole, did the failure to instruct on materiality have "a substantial and injurious effect or influence in determining the jury's verdict which led to 'actual prejudice' to the defendant." The Neder court stated that a reviewing Court making a harmless error analysis "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element."

Jenkins in turn states that although "the error in question need not be harmless beyond a reasonable doubt" . . . if applying the ["actual prejudice"] standard we are in grave doubt as to the harmlessness of the error, the conviction must be reversed." 157 F.3d at 496.

Although the Court will apply the Jenkins standards of "actual prejudice" and "grave doubt" as opposed to the "beyond a reasonable doubt" standard of Neder, the petitioners lose under either application.

The defendants did not suffer actual prejudice. The Court is not in "grave doubt" about the harmlessness of the failure to instruct on materiality in this case.[1] At the outset, the government is correct in highlighting the fact that petitioners never challenged the materiality of the alleged false and fraudulent invoices involved in the alleged schemes. While the petitioners were foreclosed from having a materiality instruction submitted to the jury, they were not foreclosed, if the evidence so reflected, from arguing materiality to the jury. Unlike the Neder case where the defendant was not allowed to argue materiality in a tax fraud count and to argue the materiality issue to the jury on mail and wire fraud counts, the petitioners, under the extant Seventh Circuit case law, could have done just that. U.S. v. Coffman, 94 F.3d 330 (7th Cir. 1996) held that the definition

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[1] As previously stated from Prewitt and Lemons, petitioners must show not only prejudice, but good cause for failure to raise the claim. Applying the cause standard, the government argues that petitioners' failure to raise this issue at trial or on direct appeal forecloses them from raising it now. Because the law in this Circuit prior to Neder and prior to trial rejected the requirement that an instruction on materiality be given in these cases, the Court finds that the petitioners have overcome the "cause" hurdle. Although the petitioners could have argued materiality to the jury without an instructions, the objection here is to the failure to give the instruction.

of fraud necessarily embodies material representations or omissions and that "instruction in the language of the statute adequately puts that issue before the jury." Coffman at 335. Coffman went on to state that this "allows the defendant's lawyer to argue in his closing statement that there was no scheme to defraud because the misrepresentation concerned a matter that was irrelevant."

The petitioners now think the evidence would have been viewed differently by the jury if they had received a materiality instruction. Thus, the Ed Brown invoices could have been viewed by the jury not as material to the charged scheme, but as part of another scheme by Brown to cheat his own business. In this scenario, the invoices would have been "immaterial" or "irrelevant" to the charged schemes to defraud. So too with the Roger Green invoices. They could have been viewed by the jury as invoices utilized by Green to defraud the petitioners' company, Delta, thus making them irrelevant and immaterial to the charged schemes.

As petitioners argue in their reply brief at p. 10, "with a materiality instruction, the jury would have had a choice -- were the schemes intended to defraud Delta as charged or were they intended to assist Brown's and Green's own admitted fraudulent schemes?"

Absent a materiality instruction, however, petitioners could still have argued these points, and would have been, as Judge Posner pointed out in Coffman, "entitled to an instruction putting this defense before the jury." But this was conditioned on there being "some evidence to support the defense." These arguments were not made and these defenses not offered at the time of trial because there was no evidence to support them.

The evidence of record however overwhelmingly supports the jury verdict. The failure to give a materiality

instruction did not have a "substantial and injurious effect . . . in determining the jury's verdict," and did not actually prejudice the petitioners. Under Neder, for that matter, the evidence of record clearly established that a jury could not have rationally made a "contrary finding with respect to the materiality element." From the record before the Court, "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder at 527, U.S. at 15.

The government presented direct evidence, through the testimony of several witnesses, establishing the existence of the mail and wire fraud schemes in the face of petitioners' argument that no fraud existed. Petitioners now present, at best, attenuated arguments and hypothetical scenarios that do not survive the Neder or Jenkins tests.

B. THE CONDON ISSUE

Habeas petitions under 28 U.S.C. Section 2255 are not vehicles to be used to circumvent a failure to raise non-constitutional issues which could have been brought at trial or on direct appeal. Buelow v. Dickey, 847 F.2d 420, 425 (7th Cir. 1988). Petitioners request a hearing based upon United States v. Condon, 170 F.3d 687 (7th Cir. 1999) to determine whether government witnesses were improperly induced to testify. Petitioners argue that if Condon had been in effect at the time of trial, they could have more thoroughly confronted those witnesses who received benefits for testifying. But Condon did not increase the number of tools available with which to exercise Sixth Amendment confrontation rights that were not available to the petitioners at the time of trial. Therefore, a habeas petition is an inappropriate forum to raise this issue for the first time. 28 U.S.C. § 2255.

Condon recognized that a promise not to prosecute does not amount to a thing of value under 18 U.S.C. Section 201(c)(2), does not confer any private right of action, is not a rule of evidence, and does not require exclusion of evidence obtained by a promise of immunity. Id. Condon did not expand the definition of what constitutes an "improper inducement." There is nothing in Condon that was not known at the time of trial and petitioners are prevented from arguing that their trial cross-examination relative to inducements to testify were limited. A habeas petition is an improper forum therefore to raise this issue for the first time. However, even if the forum was appropriate, petitioners' claim fails due to their inability to establish prejudice.

Former co-defendant Roger Green testified that his plea agreement provided for reduction of several millions of dollars in restitution he owed to victims. Other witnesses testified to receiving pardon for their civil tax obligations on illegal income they generated. Former co-defendant Ed Brown testified that he like the others received lawful inducements for this testimony.

Petitioners had ample opportunities of cross-examination to determine what benefits these witnesses received in exchange for their testimony and whether these inducements were lawful. Petitioners' Sixth Amendment right to confront their accusers was not violated.

C. NEWLY DISCOVERED EVIDENCE

In a supplemental motion, petitioners request a new trial due to newly discovered evidence. Former co-defendant Norm LoPresto (LoPresto), recently submitted an affidavit attesting that an accounts receivable scheme did not exist. Whether this scheme existed was a hotly contested issue at trial. Green testified that such a scam did exist.

This is a motion appropriate under Rule 33 and not under 2255. Rule 33 of the Federal Rules of Criminal Procedure requires a defendant to bring a motion for a new trial based on newly discovered evidence within three years of the guilty verdict. This motion is therefore untimely. Petitioners were found guilty on September 5, 1996, almost four years before this motion was brought. Petitioners submit an argument based on United States v. Evans, 2000 WI 1171971 (7th Cir.). This case is not persuasive. Petitioners argue that Rule 33 and Section 2255 should not be read together to preclude evidence discovered outside the three-year time frame where essentially the Rule 33 time frame expired before their 2255 motion was resolved. To allow petitioners to bring what is an untimely Rule 33 motion under the auspices of a timely 2255 petitioner would serve to eviscerate the statutory time limitation of Rule 33.

Even if the Court had jurisdiction to entertain the motion based perhaps on petitioners' claims of due process violations, the claim fails. A new trial based upon newly discovered evidence is granted where four requirements are met: (1) the evidence must have come to the attention of the defendant after trial; (2) the evidence could not have been discovered before trial through the exercise of reasonable diligence; (3) the evidence must be more than simply cumulative or impeaching, and (4) sufficiently probative that it would probably lead to acquittal if there were a new trial. United States v. Gonzalez, 93 F.3d 311, 315 (7th Cir. 1996). The evidence fails the second and third prongs of this test. Id.

Subsequent to petitioners trial and direct appeal, LoPresto resolved his case and learned that petitioners were convicted of an accounts receivable financing scheme. After resolving his criminal case, LoPresto executed an affidavit explaining the activities that took place between

Green and the petitioners. LoPresto was involved with Green's activities on a daily basis. His affidavit contradicts Green's testimony that an accounts receivable scheme existed. This affidavit presents evidence that is cumulative and or impeaching but not new. Moreover, petitioners assert that although LoPresto was questioned prior to trial, he was not questioned about the accounts receivable scheme because petitioners were unaware that the government was prosecuting under this theory. But reasonable diligence would have discovered this aspect of the case regardless of the theory of prosecution.

Petitioners' request for a new trial must be denied.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Petitioners 28 U.S.C. § 2255 habeas corpus petition is denied.

Dated at Milwaukee, Wisconsin, this 22nd day of March, 2001.

SO ORDERED,

/s/

HON. RUDOLPH T. RANDA
U.S. District Judge